

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

NO.

77-6015

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

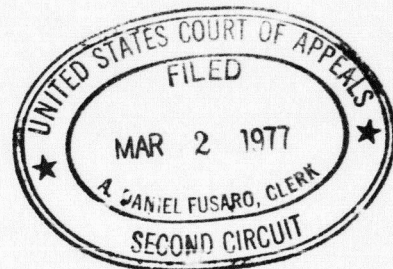
GEORGE WHITE, on behalf of)
himself and all others)
similarly situated,)

Plaintiff-Appellee,)

V.)

DAVID MATHEWS, Secretary of)
the Department of Health,)
Education and Welfare, as an)
individual and in his)
official capacity,)

Defendant-Appellant)



APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLANT

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No. 77 - 6015

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GEORGE WHITE, et al.,

Plaintiffs-Appellees,

v.

F. DAVID MATHEWS,
Secretary of Health,
Education, and Welfare

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLANT

PRELIMINARY STATEMENT

Appeal is taken from the October 29, 1976 judgment of the Honorable T. Emmet Clarie, Chief Judge, United States District Court for the District of Connecticut. The District Court's opinion is unreported.

QUESTIONS PRESENTED

The questions presented to the court are:

- A. Did the District Court err in denying defendant's motion to dismiss on grounds of mootness?
- B. Did the District Court err in denying defendant's motion to dismiss for want of subject matter jurisdiction?
- C. Did The District Court err in certifying a class action?

- D. Did the delays experienced by those seeking administrative hearings and the resulting decisions amount to a violation of the provisions of the Social Security Act or the Administrative Procedure Act?
- E. Did these delays constitute a denial of procedural due process?
- F. Did, in light of the circumstances of this controversy, including active agency and Congressional efforts at remedy, the District Court exercise proper judicial restraint in failing to defer to Congressional and administrative judgments regarding remedy and indicate proper respect for the integrity and independence of the administrative process?
- G. Did the District Court err in requiring, as part of its remedy, benefit payments to individuals who do not receive decisions with the mandated time limits?

STATEMENT OF THE CASE

On January 27, 1975, the plaintiff brought this class action on behalf of residents of the State of Connecticut seeking declaratory and injunctive relief to secure "rights and privileges" allegedly abridged by "the failure of the . . . Social Security Administration to schedule Administrative Law Judge hearings 'promptly', and to conclude the matter 'within a reasonable' time." Complaint, p. 1. On July 18, 1975, the District Court granted plaintiff's motion for a class action which would include "all potential Social Security Disability recipients, who have pending petitions for a hearing before the administrative law judge and have not had a hearing scheduled promptly and the matter concluded within a reasonable time." The parties thereafter filed motions for summary judgment, and on September 29, 1976, the District Court ruled favorably on plaintiff's motion for summary judgment and adversely on defendant's motions for summary judgment and to dismiss. On October 29, 1976, the District Court

entered final judgment directing the Defendant to conduct hearings and issue written decisions within set time limits and ordering the grant of prospective payments to those residents of Connecticut who fail to receive their final decision within the established time limits. 1/ Defendant thereafter requested reconsideration pursuant to F.R.C.P. 59(e) of the judgment's grant of prospective payments which was denied on November 12, 1976. Thereafter, Defendant noticed appeal.

STATEMENT OF FACTS

1. The Named Plaintiff

The facts relating to the named plaintiff's claim for a continuation of his Title II disability insurance benefits are set out in great detail in the affidavit of William A. Rivers, Director of the Bureau of Disability Insurance (hereinafter, "Rivers") at pages 1-5. While a recitation of these facts would demonstrate the complex and time consuming processing required in an adjudication of disability, a less detailed statement was relied upon by the District Court and adequately presents the central facts.

The plaintiff, George White, filed application for Title II Disability Insurance Benefits in July 1972 and was subsequently

1/ In its judgment of October 29, 1976, the District Court established the following time limits

1. For requests filed before 12/31/77 - 180 days
2. For requests filed on or after 12/31/77, - 150 days
but before 7/1/78
3. For requests filed on or after 7/1/78 - 120 days

determined to be under a disability as a result of a combination of impairments, including cirrhosis of the liver and chronic and acute pancreatitis. As a result of a periodic reexamination initiated in September 1973, the plaintiff was informed on January 22, 1974, that he was no longer under a disability and that benefits would terminate with January 1974. Plaintiff, on January 30, 1974, requested reconsideration of the cessation action, but was, on July 11, 1974, informed that the cessation had been affirmed upon reconsideration. On July 29, 1974, plaintiff requested a hearing before an administrative law judge which was held on April 29, 1975. A hearing decision, again adverse, was issued on May 21, 1975, some 306 days later. Plaintiff then requested Appeals Council Review which resulted in a favorable decision on December 3, 1975.

2. The Hearing Delay Problem.

a. A Backlog of Title II Hearing Requests

As the affidavit of Daniel L. Schultz, Acting Director of the Bureau of Hearings and Appeals (hereinafter, "Schultz, p. ") indicates at pages 5-9, the Bureau of Hearings and Appeals is faced with a nationwide problem of backlogs in requests for hearings, a problem which extends to residents of Connecticut. The roots of this problem are three-fold -- 1) a very large one-time volume of claims for Black Lung benefits under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §901 et seq., and the introduction of Title XVI of the Social Security Act, (hereinafter, "Act") Supplemental Security Income for the Aged, Blind, and Disabled (hereinafter, "SSI"), 42 U.S.C. §1381 et seq., at a time when the program administered under Titles II and

XVIII of the Social Security Act, Old Age, Survivors, Disability and Health Insurance, was experiencing rapid growth; 2) a lack of flexibility in the use of three distinct corps of legislatively created hearing officers (Title II and XVIII Administrative Law Judges, Black Lung Administrative Law Judges, and SSI Hearing Examiners); 3) difficulties encountered in appointing additional administrative law judges.

After the inception of the Black Lung program, approximately 75,000 requests for hearings under this program were received by the Bureau of Hearings and Appeals. Since the Social Security Administration's jurisdiction over this program was temporary, originally ending with claims filed on December 31, 1971, but later extended to June 30, 1973, the Bureau was confronted by a massive, one-time workload. Since a reduction in force which would have terminated their appointments would necessarily have followed, it was virtually impossible to appoint administrative law judges to handle this one-time workload. Over 2 years after enactment of the Black Lung program, the Bureau received the necessary Congressional authority to appoint a special administrative law judge corps for this program. However, the Bureau was required, as an interim measure, to use existing Title II Administrative Law Judges to hold a substantial number of Black Lung hearings. 2/ This resulted in a buildup of the pending Title II

2/ The Commissioner of Social Security, James Cardwell, in his testimony before the House Subcommittee of Social Security indicated that over 17,000 Black Lung hearings were held by Title II Administrative Law Judges. Delays in Social Security Appeals, Hearings before the Subcommittee on Social Security of the House Committee on Ways and Means, 94th Cong., 1st Sess., 38 (1975) (hereinafter, "House Hearings").

hearing workload which had independently increased from 42,573 hearing requests in FY 1970 to 76,281 in FY 1974.

This workload again increased when Title XVI of the Social Security Act, the Supplementary Security Income program, became effective on January 1, 1974. The new legislation authorized the Bureau to appoint hearing examiners under Title XVI, but to protect against allegations that the Bureau had selected less than independent, qualified hearing examiners, the appointment process was patterned upon the Civil Service Commission's procedures for the selection of Title II administrative law judges. This process required an extended period of time and the interim use of Title II administrative law judges for the SSI workload. Many of the SSI claims were coupled with Title II social security claims, and the Bureau was, in this situation, required to utilize a Title II administrative law judge to hear the case. This lack of flexibility and the delays in appointments resulted in a buildup of an abnormally high national hearing backlog which reached an all time high of 113,000 in April 1975. 3/

b. The Agency's Initiatives.

After preliminary study, the Social Security Administration made a concerted effort to reduce the hearings backlog. As the Schultz affidavit at p. 6-7 indicates, initiatives have been undertaken since January 1975 to reduce this backlog and processing times. Initially, a case processing goal was established in an effort to identify more precisely the scope of the remedy required

3/ As a result, the average time between request for a hearing and entry of a final decision for the period of January 1973 through March 1975 was 195.2 days, nationally, and 211.8 days for residents of Connecticut.

-- i.e., to stabilize the workload by the end of FY 1976.

To implement this goal, one of the initial steps was to identify areas where cases could be processed more quickly by the addition of support personnel and/or more sophisticated equipment. From January 1975 through mid-September 1975, an additional 258 support personnel were authorized for hearings officers who had demonstrated that they could dispose of more cases with such assistance. In addition, the Bureau upgraded the quality of office equipment available to hearings officers, including the placement of over 90 automatic magnetic card typewriters which permitted decisions to be rendered more quickly. The first stage of an automatic case control and case locator system was installed and, when installation is complete, will allow for greater management control over the caseload and a reduction in the volume of reporting required by the hearing officers.

To further relieve the hearings officers of non-judicial functions and/or functions unrelated to the hearing of cases, the Bureau enlarged the professional support staff available to the hearings officers. Initially, experienced central office hearings and appeals analysts were detailed to the hearings officers to assist hearings officers in drafting decisions and obtaining needed medical evidence.

In addition, a new program was instituted to hire recent law school graduates to continue and expand this professional staff support. This latter program, the Staff Attorney Support Program, was instituted in August 1975 with 160 law graduates attending in-depth training sessions throughout the country. At the time of the District Court proceedings over 200 of these Staff

Attorneys were located in hearings offices with three located in the offices that service the State of Connecticut. Plans were underway to increase this to over 300 Staff Attorneys nationwide, 4/ given the initial results of this program which were quite favorable in terms of increasing the productivity of the administrative law judges to whom the legal assistants were assigned.

The impact of these initiatives on the hearing process can be seen in the 62% national increase in performance from the lowest point in the fourth quarter of FY 1974 through the end of the first quarter of FY 76. Nationwide, average number of monthly dispositions per hearing officer for the period September 13, 1974, through October 10, 1974, was 14.8; for the period September 14, 1974, through October 11, 1975, the average rose to 21.1. In the offices servicing Connecticut, there were also increases in production. For the period September 15, 1974, to January 4, 1975 (monthly figures not available), the average monthly dispositions per administrative law judge was 14 in the Hartford office. For the period September 14, 1975, to December 6, 1975, the average rose to 20.3. In the Providence, Rhode Island office, for the same periods, the average increased from 11 to 15.2. Overall, the increase in productivity had resulted in a significant reduction of the backlog of pending cases at a rate of about 1,000 cases per month nationwide. 5/

4/ The Staff Attorneys do not, of course, function as adversary counsel for the government. Rather, they serve a function analogous to that of a judicial law clerk.

5/ This backlog had declined by June 1976 to 87,860 pending requests despite a 25% increase in anticipated hearing requests for FY 76. Affidavit of Jan J. Sagett, Deputy Director of the Bureau of Hearings and Appeals, p. 2 (hereinafter, "Sagett").

In addition, our experience had shown that a substantial number of reversals at the hearing level occurred as a result of a deterioration in the claimant's condition or the receipt of new and material evidence, and an "informal remand" procedure was devised in order to award benefits, if possible, without the necessity for a hearing. Accordingly, all pending hearing requests were screened for the possibility of immediate favorable action or to obtain additional evidence which could possibly result in such action. These cases were processed promptly and resulted in favorable action being taken in 5,500 cases.

The agency's initiatives extended much further. For example, the appointment of additional administrative law judges and hearing examiners has continued. In the first half of 1975, 62 additional administrative law judges and 37 hearing examiners were appointed. "House Hearings", p. 40. In addition, the agency had hoped to hire an additional 56 administrative law judges, but only 24 could be obtained. 6/

6/ The acquisition of additional administrative law judges is never an easy matter. As Commissioner Cardwell indicated in his testimony:

At this point, I should mention that we have attempted to appoint additional ALJ's in the numbers we believe are needed. However, the last register supplied to meet our need for 75 new ALJ's was not sufficiently extensive to enable us to appoint ALJ's to certain hard-to-fill offices in certain geographical locations. We were able to appoint only 43, considerably below our demonstrated needs. We are working with the Civil Service Commission to find ways to increase the size of the register and to secure ALJ's for the neediest offices.

(Continued on next page.)

The difficulties of acquisition are, of course, only half of the story for retention of these highly qualified individuals ("House Hearings", 186-214) is complicated by the fact that Title II Administrative Law Judges are classified by the Civil Service Commission at the GS-15 pay level while other equally qualified administrative law judges are paid at the GS-16 level. As the Schultz affidavit indicates at page 8, footnote 1, 14 of the 59 administrative law judges separating from service with the agency during the period January 1973 through April 1975, assumed GS-16 administrative law judge positions with other agencies.

c. The Legislative Response.

At the request of 73 members of Congress, the House Subcommittee on Social Security held extensive hearings on the backlog problem in September and October of 1975. Testimony was heard from 43 witnesses, including some of the foremost experts in administrative and/or social security law. The testimony ranged far, covering suggestions for changes in the hearings procedures and in the administration of the disability program. The results were three-fold. The committee drafted and the Congress passed

6/ (Continued from previous page.)

The recruitment and placement process itself is proving to be cumbersome in our opinion. "House Hearings", p. 40.

A "register" or list of eligible individuals must be requested from the Civil Service Commission which is ultimately entrusted with the responsibility for the recruitment of potential administrative law judge candidates, the establishment and nature of the appointment process, the general qualifications for eligibility, and classification of the positions federal salary level. There has been substantial criticism of the Commission's execution of these responsibilities. H.R. 94-679, 94th Cong. 1st Sess. 4 (1975).

H.R. 10727 which was signed into law on January 2, 1976, as P.L. 94-202, a remedial enactment designed to allow greater flexibility in utilization of SSI and Black Lung hearing examiners. The committee also recommended that the Social Security Administration authorize the Center for Administrative Justice to initiate a study of the existing appeals procedure and offer recommendations concerning possible structural changes in the existing system. Finally, the committee indicated that it would consider the appeals process in depth in the next session of Congress. H.R. 94-679, 94th Cong., 1st Sess., 2 (1975).

In addition, legislation before the Congress, such as H.R. 5276, Rep. Seiberling, would have imposed time limits for a hearing decision (120 days in the case of H.R. 5276). But no such restriction was included in P.L. 94-202. 7/

7/ The immediate impact of P.L. 94-202 was succinctly described by the Committee on Ways and Means.

The Committee bill also grants authority for those SSI hearing examiners (who have been appointed under section 1631(d)(2)) to hear cases under titles II, XVI and XVIII until December 31, 1978 as temporary Administrative Law Judges if the Secretary of HEW finds it will promote the achievement of the objectives of these titles. It is the Committee's understanding that the Secretary will make this finding as to all SSI hearing examiners who have been appointed. The Committee also understands that now virtually all the temporary Black Lung judges hold SSI hearing examiner appointments and this would provide the Bureau of Hearings and Appeals the 200 judges it needs to reduce the backlog. Furthermore, by the end of 1978, all SSI examiners will have acquired sufficient adjudication experience to meet the experience requirement for appointment as regular ALJs. They would, as they met the experience requirement, be afforded the opportunity to be placed on the register for regular ALJ appointment on a merit basis under the regular Civil Service procedures. H.R. 94-679, 94 Cong. 1st Sess, 4 (1975).

ARGUMENT

Summary of Argument

1. This case was moot with respect to the named plaintiffs before the class was certified. The requisite case or controversy was, therefore, lacking and the action should have been dismissed as moot. O'Shea v. Littleton, 414 U.S. 488, 494 (1974); Sosna v. Iowa, 419 U.S. 393 (1975).

2. The District Court lacked subject matter jurisdiction. Weinberger v. Salfi, 422 U.S. 749 (1975), and Mathews v. Eldridge, 424 U.S. 319 (1976), have defined the scope of jurisdiction of the federal courts over claims arising under the Social Security Act, have interpreted Section 205(h) of the Act, 42 U.S.C. §405(h) to preclude resort to other jurisdictional bases, and have defined the prerequisites for jurisdiction under Section 205(g) which plaintiffs failed to satisfy. In addition, mandamus jurisdiction and relief were clearly inappropriate under traditional analysis for the timing of a hearing rests in the Secretary's discretion.

3. The District Court erred in certifying a class for the requirements of commonality of questions of law and fact contained in F.R.C.P. 23(a)(2) could not be met given the nature of the inquiry, the reasonableness of a delay, which must necessarily vary from case to case. Moreover, the named plaintiff could not in this case represent the class given his mooted claim.

4. The District Court erred in concluding that the delays complained of violate the Social Security Act and/or the Administrative Procedure Act (APA). The timing of hearings is left by

the provisions of the Act to the discretion of the Secretary. The Social Security Act and pertinent legislative history impose and contemplate no set time limits on disability hearings. The APA has no application to the timing of Social Security hearings. Moreover, given the circumstances under which the Bureau of Hearings and Appeals has labored, the delays experienced do not constitute "unreasonable" delays within the terms of either statute.

5. The District Court erred regarding the constitutional merits. The class' interests as applicants cannot be equated to the interest of the welfare recipient in Goldberg v. Kelly, 397 U.S. 254 (1970), which involved reliance upon the benefit in question. Mathews v. Eldridge, supra, establishes that the protections afforded claimants at the initial and reconsideration levels of the administrative process provide adequate due process protections for an applicant's interest prior to a hearing. This interest is in addition adequately protected by retroactive benefit provisions. Lavine v. Milne, 424 U.S. 577 (1976). Moreover, the court failed to take adequate account of the Government's interest in this action and its order will detrimentally affect that interest.

6. Interference in the administrative process was unwarranted. Congress and the Social Security Administration have actively taken remedial action with respect to the hearing delay problem since January 1975. The subject is one of ongoing concern, analysis, and action on the part of both entities and the court below should have deferred to these instrumentalities. The

Supreme Court in recent cases has recognized the propriety of judicial deference and restraint in matters of administration. Wright v. Richardson, 405 U.S. 208 (1972); Mathews v. Eldridge, supra; F.C.C. v. Pottsville B. Co., 309 U.S. 134, 146 (1948). This suit was additionally not a properly justiciable matter because of the controversy's insusceptibility to judicial remedy. Baker v. Carr, 369 U.S. 212, 217 (1962); Powell v. McCormack, 395 U.S. 486, 517 (1969).

7. The District Court erred in granting prospective payments as part of the relief in this case. Section 205(q) of the Act rejects such relief and Section 205(i) of the Act imposes a statutory bar to such relief.

In view of the importance of the substantive issues addressed in items 4, 5, 6, and 7 and their impact upon the procedural issues, we shall first discuss the substantive issues.

I. Substantive Issues

A. The delays complained of do not violate the provisions of the Social Security Act or the Administrative Procedure Act.

1. The Social Security Act. 8/

8/ While the District Court concluded that the delays violated the provisions of the Social Security Act and the Administrative Procedure Act, the court's opinion provides no real guidance regarding its rationale for this conclusion. The only rationale provided by the court is directed to the constitutional challenge to the delays, an unnecessary and inappropriate inquiry given its conclusions regard the statutory issues. Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

- a. Section 205(b) of the Act leaves the timing of hearings to the Secretary's discretion.

Section 205(b) of the Act, 42 U.S.C. §405(b), which authorizes hearings under Title II does not, as plaintiff conceded at page 16 of his initial brief to the District Court, by its plain language mandate time limits for the processing of a request for hearing. Indeed, a contrary suggestion would come as a great surprise to the staff of the House Subcommittee on Social Security which cautioned against the statutory adoption of "certain processing time limits" given a concern for a potentially adverse effect upon the quality of adjudication. Staff of House Subcommittee on Social Security, 94th Cong., 1st Sess. Appeals Process: Areas of Possible Administrative or Legislative Action, 1 (1975) (hereinafter, "House Appeals"). The position reflects an obvious conclusion regarding legislative intent -- that accuracy of payment must not be subordinated to speed of payment. Indeed, as our discussion of Section 205(q), of the Act, 42 U.S.C. §405(q), infra at p. 16-19 demonstrates, a paramount Congressional concern with accurate adjudication has extended even to those situations where Congress felt the need for prompt payment to be most compelling. Moreover, the Congress has not, even in the context of Section 205(q), attempted to place time constraints upon the adjudicatory process. Rather, it has permitted limited payment in lieu of an accelerated adjudication -- an implicit recognition of the very intractable nature of adjudicatory and

workload problems. 9/ The Congressional rejection of processing time limits is further emphasized by clear Congressional time limitations in the processing of SSI hearing requests. 42 U.S.C. §1381(c)(2). When the legislative intent to require expedition exists, the language is obviously within the Congressional grasp.

As currently drafted, Section 205(q) makes provision for expedited benefit payments under certain limited conditions. The antecedent of Section 205(q) was a proposal by Senator Scott of Pennsylvania which was made during the Senate Finance Committee Hearings on the 1967 Amendments to the Act. Senator Scott urged the committee to adopt his bill, S. 1954, as an amendment to the proposed Social Security Amendments. Hearings on H.R.

9/ As Commissioner Cardwell in a statement before the House Subcommittee on Social Security in September 1975 stated:

As already noted, the nature of the hearings process limits our capability to deal with pending workloads. The present system, with the need to establish an evidentiary record which must be able to withstand judicial scrutiny, is a time-consuming and expensive process under the best conditions. Each hearing must be handled individually as a strictly human endeavor. An automated, electronic, or other mass production system is not possible although support systems are possible. Thus, the time and staff expended is grossly disproportionate to the volume involved. House Hearings 38.

The timing of a hearing, must, as Congress has recognized, be left to the Secretary's discretion. Disability cases by their complicated nature, encompassing infinite variables, are not fungible. No one time is reasonable for all cases, and the Social Security Administration, alone, has both the expertise and experience necessary to determine what is reasonable with respect to a specific case.

12080 Before the Senate Committee on Finance 90th Cong., 1st Sess., 1407-15 1409 (1967). The Senator's bill provided for payment of benefits on the basis of an application if 90 days had elapsed from the filing of the application, no compelling evidence controverting the allegations in the application existed, those allegations indicated that entitlement would arise if the allegations were correct, and no payment had been received. Significantly, the bill also applied to disability insurance benefits. The Senate's action is, we believe dispositive of plaintiff's allegation that the Secretary has violated the Social Security Act.

The Senate Finance Committee did not adopt S. 1954. But it did propose, and the Congress adopted Section 205(q). The legislative history is illuminating.

The committee bill contains a provision (not in the House-passed bill) which would provide a formal method under which a person may file a special request for benefit payments which are due but have not been paid.

The committee believes that most beneficiaries are dependent on their social security payments to meet their everyday needs and that assurance of prompt payment is vital to their financial well-being.

The committee recognizes that there are situations in which delays may occur because the Social Security Administration is seeking definitive evidence of eligibility even though there is a prima facie case that a benefit is due the individual. The Committee recognizes the desirability of holding erroneous benefit payments to a minimum. However, it believes that in such situations it is desirable for payments to be made, at least on a preliminary basis, with as little delay as possible. The committee bill contains a provision which specifically authorizes such a procedure. It is important, however, that the Secretary should not be forced into making doubtful payments merely because of the passage of time, therefore, under the bill the individual must have supplied

all evidence requested, and the Secretary must be confident of the validity of the claim, before an expedited payment can be made on the basis of a request for payment under the new provision.

* * * * *

The bill would specifically exclude from the new expedited benefit payments procedure cases involving determinations as to whether a person meets the Social Security Act definition of disability for purposes of qualifying for benefits payable on account of disability. In the old-age and survivors insurance part of the program the issues involved are usually those that affect the amount of the benefit or the date for which payment is first due; in most cases, the basic question of entitlement is not at issue. Therefore, erroneous payments in the old-age and survivors insurance part of the program can usually be adjusted at a later point.

In the case of benefits based on a disability the usual issues is the basic question of whether or not the individual is sufficiently disabled to be entitled to a payment at all. The process of making disability determinations is significantly different from the retirement and survivors insurance claims process. In the disability process State vocational rehabilitation agencies are involved importantly in the making of the decision and in borderline cases lengthy and extensive development of facts of a medical nature is often required. Because the Secretary should be reluctant to make a favorable finding of basic eligibility in the disability area on the basis of partial evidence, the expedited payment procedure is not provided in disability cases. S.R. 744, 90th Cong., 1st Sess., 106-07 (1967) (Emphasis supplied).

The legislative history in our view establishes five points:

1. A clear rejection of the suggestion that the benefits should be paid because a time limit has been exceeded.
2. A clear rejection of the suggestion that benefits should be paid when the Secretary is not confident of the validity of a claim, a situation which must of necessity exist when the claimant has been denied twice, once at the initial and once at the reconsideration level.
3. A clear exclusion of the disability insurance program based, in part, upon a realization that basic entitlement

is at issue and that a substantial probability of non-entitlement exists with a resulting loss of benefit payments which could not be recovered.

4. A clear recognition of the inherent complexity of the disability determination process and of the reasonableness of the lengthy, but necessary delay which evidentiary development will entail.

5. An obvious election to make limited payments, albeit potentially erroneous payments, rather than impose certain time limits upon the Secretary's adjudicatory function.

In sum, the legislative history indicates that the Congress, which enacted, oversees, and continually defines the scope of the Act and the nature of the statutory entitlements which flow from the Act, emphasized in Section 205(q) its policy -- the Trust Funds will pay benefits only to those entitled even though substantial delay may accompany a disability determination.

If the legislative purpose is plain, the courts cannot assume to do what Congress has refused to do. Southern S.S. Co. v. N.L.R.B., 316 U.S. 31 (1947). The legislative history of the Act clearly and unmistakably rejects the assertion that Congress intended a time limit to be imposed upon proceedings under Section 205(b).

b. The Congress has concluded that no unreasonable delay exists.

But, an equally compelling circumstance demonstrates that Congress has not found the current processing problem to produce "unreasonable delay". The Congress is clearly aware of the current appeals situation, of the agency's initiatives, of the potential remedies and their limitations, and of the impact of this situation upon claimants. Yet the Congress did not mandate that a hearing be held with a time certain or that payment be

made if a hearing was not held. But it did enact P.L. 94-202 which is described as the most effective action that can be taken immediately. H.R. 94-679, 94th Cong., 1st Sess., p. 1 (1975). 10/ If the Congress with its vast knowledge of and power over federal governmental operations could or would not accord plaintiffs' class the relief that they sought and that the District Court granted, it necessarily follows that the Secretary who has made substantial efforts to accord plaintiff's class the relief that it seeks with far less power at his disposal has not acted unreasonably. Similarly, it necessarily follows that the delays now experienced are, in the Congressional view, reasonable given the complexity of the problem.

10/ The legislation reflects the incredible complexity of the situation which poses numerous and substantial policy judgments. As the Staff of the House Subcommittee noted,

A number of bills and suggestions have been presented to the Subcommittee. They may have great merit, but the Staff believes that it would be premature to act on them until the results of some rather significant studies, demonstration projects, and court cases have been received, and the disability insurance program can be examined by the subcommittee in a comprehensive manner which we suggest be undertaken early next session. Moreover, other amendments might have the effect of complicating and making more controversial legislation which might otherwise be enacted in a short period of time. The appeals crisis is almost wholly the creature of the social security and SSI disability programs and although mandating by statute certain processing time limits might seem on the surface a desirable thing to do, such legislation might also have an adverse effect on the quality and uniformity of disability adjudication which is already somewhat suspect. At present, the disability insurance system has a serious short-term and long-term actuarial deficit which was unanticipated and largely unexplained. Recent statistics indicate that this situation may be getting worse. The number of benefit awards for the period September 1974 to September 1975 was 20 percent higher than those for the 12 months preceding this period. House Appeals 1 (1975).

That Congressional determination should be accorded controlling weight. The Congress drafted both the Social Security Act and the Administrative Procedure Act. Similarly, the Congress is aware of the provisions of those Acts and of the meanings of their terms. Yet the Congress did not grant the relief plaintiff requests. That fact, which also raises a substantial question of justiciability, is, we believe, compelling evidence of the reasonableness of the delay that plaintiff complains of.

The courts are not charged with general guardianship against all potential mischief in the complicated tasks of government. The present case makes timely the reminder that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts. Missouri, Kansas & Texas Ry. Co. v. May, 194 U.S. 267, 270, 24 S. Ct. 638, 639 48 L. Ed. 971. Congress which creates and sustains these agencies must be trusted to correct whatever defects experience may reveal. Interference by the courts is not conducive to the development of habits of responsibility in administrative agencies. Anglo-American courts as we now know them are themselves in no small measure the product of a historic process. F.C.C. v. Pottsville B. Co., supra at 146 (1940).

2. The Administrative Procedure Act Has Not
Been Violated.

Section 706(1) of 5 U.S.C. states that:

The reviewing court shall -- (1) compel agency action unlawfully withheld or unreasonably delayed.

While the central question 11/ is whether the "delays" complained

11/ Other questions may be raised such as, the commitment to agency discretion of the issue of processing procedures and times by virtue of 5 U.S.C. §701(a)(2) given a) the existence of 42 U.S.C. §405(b) and b) the scope of the relief sought which would intrude heavily into the internal operations of the Social Security Administration. This conclusion is reinforced by the Attorney General's endorsement of the APA which relied upon Pottsville B. Co., supra, in explanation

of are unreasonable, an initial question is raised by the District Court's application of the Administrative Procedure Act to the Social Security appeals process.

a. The Administrative Procedure Act Does
Not Apply to SSA Disability Hearings.

The APA provisions on the timing of agency action have no application to Social Security hearings. The specific language of the Social Security Act and the legislative history surrounding that Act take precedence over the language in the APA. Cf., Richardson v. Perales, 402 U.S. 389, 409-410 (1971). In Perales, the Court declined to investigate the application of the APA where the administrative procedures under the Social Security Act did not vary from that prescribed by the APA which had been modeled on the Social Security Act.

The present case is similar. The opportunity for a hearing requirement of Section 205(d) is not inconsistent with the reasonable time standard of the APA (5 U.S.C. §555(b)) and, therefore, resort to the APA is inappropriate. Rather the standards reflect the differing weights accorded the requirement in light of the exigencies of the differing procedural systems. Given the absence of adversary proceedings which often trigger delaying tactics, the monumental size of the hearing workload with the everpresent threat of backlog, and the existence of a vocal constituency, the Congress, which could meet the anticipated problems, obviously reserved the right of review. Moreover,

11/ (Continued from previous page.)
of review under 5 U.S.C. §706(1). That endorsement was made part of Senate report and the House proceedings. U.S. Congress, Senate Committee on the Judiciary, Administrative Procedure Act, Legislative History, 79th Cong., GPO, (1946) p. 230, 414.

the absence of a sanction provision in the Social Security Act, such as Section 706(1) of the APA, evinces the vesting of a judicially unreviewable discretion in the Secretary to determine what constitutes "reasonable notice and opportunity for a hearing" under that Act.

b. No "Unreasonable" Delays Occurred.

Although delays undeniably occurred in the present case, they clearly were not unreasonable in light of all the facts. We have set forth the causes of the backlog. The best efforts possible were made throughout the period that delays have existed, and every viable solution was attempted. Congress, in declining to enact time limits and in seeking to alleviate the agency's problems by other means, recognized that in this context past delays had not been unreasonable.

Moreover, the District Court's single-minded reliance on processing times is analytically misleading. 12/ As the court in F.T.C. v. J. Weingarten, Inc. noted:

We are the first to emphasize that agencies must exert the greatest resourceful, imaginative ingenuity in devising procedures which in a day of ever-expanding dockets will permit the regulatory process to function properly with reasonable dispatch. 13/ Hill v. FPC, 5 Cir., 1964, 335 F.2d 355 (1964). But we think it

12/ Statistically, the time figures are a less than reliable indication of current performance. Since older, backlogged cases are disposed of first, an accelerated disposition of these cases would be reflected in longer processing times despite general improvement in the system. Time alone would not clearly reflect current performance levels and/or improvements. Moreover, the situation will be less than adequately represented by statistics of past years given the very dynamic situation.

13/ The attempt to exercise such ingenuity in meeting the influx of Black Lung and Supplemental Security Income hearing requests with Title II ALJ's is, in part, responsible for plaintiffs' (Continued on next page.)

would be the extremely rare case where a Court would be justified in holding -- as Weingarten urges us to do here -- that the passage of time and nothing more presents an occasion for the peremptory intervention of an outside Court in the conduct of an agency's adjudicative proceedings. This is certainly not such a case. F.T.C. v. J. Weingarten, Inc., 336 F.2d 687, 691-92 (1964).

Indeed, on this record, the Weingarten court would surely have dismissed this action.

With respect to delay, Weingarten's claim rests on the simple contention that as a matter of law the Commission is not proceeding with dispatch when a complaint pends for some 2 and 1/2 years before a Hearing Examiner and 11 months thereafter before the whole Commission. Absent proof of the normal time necessary to dispose of a similar proceeding or of facts tending to show a dilatory attitude on the part of the Commission or its staff -- matters totally undeveloped on this record -- we are unable to say that a Judge can so hold. So far as this record shows, this case. . . proceeded at a rate comparable to that normally experienced in cases of its kind. . . F.T.C. v. J. Weingarten, Inc., supra at 691.

Clearly, the plaintiff has not shown that the class will suffer from processing times markedly different from the norm or from a dilatory attitude on the Secretary's part.

The delays complained of are the result of an undisputed workload. That in itself is a sufficient defense to the allegation that those delays are unreasonable.

Moreover, even if some prejudice -- as yet unshown -- might later surface or be demonstrated, no different result would follow since the District Court's conclusion that the EEOC acted unreasonably cannot be sustained. In the first place, the delay in investigating charges is clearly, as the District Court found, the result of

13/ (Continued from previous page.)

complaint. This suggests the inevitable tensions which arise when a massive workload must be met by a limited staff and budget and raises the question of competing interests on the part of other claimants at all levels, including the initial and reconsideration stages.

an "undisputed workload and an overburdened staff," and there is not any suggestion that it has resulted from slothfulness, lethargy, inertia or caprice. This Court is only too painfully aware of the inescapable backlog which inevitably develops when exploding dockets exhaust severely limited resources which are not increased in proportion to the ever-expanding demands and inundating filings. Chromcraft Corp. v. EEOC, 465 F.2d 745, 747-48 (5 Cir., 1972).

There are no absolute standards by which it may be determined whether a proceeding is being advanced with reasonable dispatch. What is reasonable can be decided only in the light of the nature of the proceedings and the general and specific problems of the agency in discharging its functions and duties. Everyone cannot be given prompt and immediate hearings by an administrative tribunal which has a caseload beyond its capacity to process promptly. Deering-Milliken, Inc. v. Johnson, 295 F.2d 856, 867 (4 Cir. 1961).

B. The Delays Complained Of Do Not Deny Procedural Due Process.

1. Introduction.

The District Court based its due process analysis on the model set forth in Mathews v. Eldridge, supra at 335. 14/ The Supreme Court set out three factors to be considered in due process analysis:

. . . first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. (Citation omitted.)

14/ It should be emphasized that application of the model to the facts of a given case is always "an intensely practical matter." Goss v. Lopez, 419 U.S. 565, 577-78 (1973).

The District Court misapplied these factors, and reached a result contrary to the result compelled by the basic tenets and holdings of the Eldridge opinion.

2. Eldridge is on its Face Dispositive.

In Eldridge, the plaintiff, a Title II disability insurance beneficiary, instituted an action challenging the constitutional validity of the Secretary's administrative procedures for the termination of disability insurance benefits. Asserting that due process required an oral evidentiary hearing prior to the termination of his disability benefits, plaintiff prevailed in both the district court and the Court of Appeals. The Supreme Court in an opinion authored by Mr. Justice Powell reversed concluding that "an evidentiary hearing is not required prior to termination of disability benefits and that the present administrative procedures fully comport with due process." Mathews v. Eldridge, supra at 349.

The Court's conclusion that the Due Process Clause does not require a pretermination evidentiary hearing must be regarded as dispositive of plaintiff's constitutional attack in the instant suit. If the requirements of due process are satisfied by procedures which do not provide for an oral evidentiary hearing, it cannot be urged that a "delay" in disposition of a request for an oral evidentiary hearing amounts to a violation of the requirements of due process. The Court confronted the question of delay in administrative review in its due process analysis and assumed a ten to eleven month delay between hearing request and

decision, a delay far longer than the 211.8 day average time present in this action. Mathews v. Eldridge, supra at 341-42. However, this delay did not amount to a deprivation of procedural due process for the Supreme Court concluded that "the present administrative procedures fully comport with due process." Mathews v. Eldridge, supra at 349. Indeed, if the delay were significant from a due process standpoint, 15/ Plaintiff Eldridge would clearly have received his pretermination hearing.

This a fortiori conclusion that the delays of which Plaintiff White complains do not amount to a deprivation of due process is clearly reinforced by an extended analysis of the Eldridge opinion which systematically rejected the substance of arguments which were used by Plaintiff White as the underpinnings of his due process attack. While the plaintiff repeatedly emphasized that the delays complained of amounted to a substantial deprivation of a protected interest which was analogous to the interest in welfare benefits that existed in Goldberg, the Court in Eldridge rejected the predicates of Plaintiff White's "substantial depri-

15/ As the Court noted, the "torpidity of. . . administrative review" and "typically modest resources of the family unit" impose a hardship which "may be significant." But this possible hardship appears analytically to have been overbalanced, if not in its entirety, at least, in major part, by the fact that a disabled worker's need "is likely to be less than that of a welfare recipient" and the fact that "other forms of government assistance will become available where. . . termination. . . places a worker. . . below the subsistence level." Mathews v. Eldridge, supra at 342. The existence of these forms of assistance in this case is amply demonstrated by reference to the supporting affidavits of Plaintiff White.

vation" arguments, i.e., need, economic hardship and irreparable harm. Mathews v. Eldridge, supra at 340-42. Moreover, though the Court noted that Plaintiff Eldridge's interest in continued receipt of benefits was similar in nature to that of the welfare recipient in Goldberg" Mathews v. Eldridge, supra at 340) it clearly was not id

In addition, the Court's delineation of the plaintiff's interest was equally significant.

Since a recipient whose benefits are terminated is awarded fully retroactive relief if he ultimately prevails, his sole interest is in the uninterrupted receipt of this source of income pending final administrative decision. . . . Mathews v. Eldridge, supra at 340. (Emphasis supplied.)

If the entitled beneficiary's sole interest is in the uninterrupted receipt of benefits (the interest of Plaintiff-Beneficiaries Eldridge and White), the interest of the non-entitled applicant (the bulk of the class) is clearly so insubstantial that it must approach the level of a de minimis interest given the unsettled question of his initial entitlement and disability. Indeed, given the existence of retroactive benefits, the applicant's interest amounts to little more than a unilateral expectation that benefits will be paid which must necessarily be greatly attenuated given the applicant's two prior denials at the initial and reconsideration stages of the adjudicatory process. Consequently, it is only marginally arguable that the applicant's interest amounts to a protected interest. Board of Regents v.

Roth, 408 U.S. 564, 577 (1972).

This analysis finds substantial support in Lavine, etc. v. Milne, 424 U.S. 577 (1976). In Lavine, plaintiff challenged a provision of New York welfare law which stated that an individual applying for assistance within 75 days after voluntarily terminating his employment or reducing his earnings would be "deemed" to have done so to qualify for welfare benefits and imposed as a sanction disqualification from benefits for the 75 day period. Responding to the plaintiff's argument that an administrative hearing procedure which furnished a decision 90 days after initial disqualification and 15 days after the disqualification ended was meaningless, the Court noted:

[T]he State's procedure in ascertaining the applicant's purpose in quitting his job is not different from its procedure in determining any of the other substantive requirements for eligibility. An applicant visits the local agency, is informed of the eligibility criteria, and in response to questions posited by the local official is afforded an opportunity to demonstrate his eligibility. . . . The answers to these questions determine whether the applicant has the right to appeal and to receive a full hearing. Certainly nothing in the Constitution requires that benefits be initiated prior to the determination of an applicant's qualifications at an adjudicatory hearing. Lavine, supra, at 586-87.

While the "delay" in Lavine was 90 days, less than that here, the delay was sufficiently long to cover the entire period in which serious need could exist, i.e., the 75 day disqualification period. Consequently, Lavine must offer substantial support for our contention that a non-entitled beneficiary's interest is insubstantial.

The District Court, however, viewed the personal interest

involved here as significantly different from that at issue in Eldridge. While it is true that Plaintiff Eldridge challenged the absence of a pretermination hearing and Plaintiff White challenges the speed with which a hearing decision is rendered, the distinction merely reinforces the conclusion that Eldridge must control here. The District Court failed to recognize that the crucial inquiry is the degree of potential deprivation present. There clearly was no distinction in this regard. Moreover, the degree of deprivation present here must be even less significant for the non-entitled class member lacks any reliance interest in the benefit.

Similarly, the District Court clearly misapplied the rationale of Eldridge in assessing the relevant "error" rate in this case. Initially, the District Court fell into a statistical pitfall, cautioned against in Eldridge, by assuming that a reversal after appeal to the hearing level constituted error. As the Court cautioned in Eldridge:

Bare statistics rarely provide a satisfactory measure of the fairness of a decision making process. Their adequacy is especially suspect here since the administrative review system is operated on an open-file basis. A recipient may always submit new evidence, and such submissions may result in additional medical examinations. Such fresh examinations are held in approximately 30% to 40% of the appealed cases, either at the reconsideration or evidentiary hearing stage of the administrative process. Mathews v. Eldridge, supra at 346-47.

In addition, the District Court concluded that the relevant error here must be differently calculated than in Eldridge since this class consisted only of individuals who had taken appeal. This was clearly incorrect. As the Court observed in Eldridge:

By focusing solely on the reversal rate for appealed reconsideration determinations amici overstate the relevant reversal rate. As we indicated last Term in Fusari v. Steinberg, 419 U.S. 379, 383 n. 6 (1975), in order fully to assess the reliability and fairness of a system of procedure, one must also consider the overall rate of error for all denials of benefits. Here that overall rate is 12.2%. Moreover, about 75% of these reversals occur at the reconsideration stage of the administrative process. Since the median period between a request for reconsideration review and decision is only two months, . . . the deprivation is significantly less than that concomitant in the lengthier delay before an evidentiary hearing. Netting out these reconsideration reversals, the overall reversal rate falls to 3.3%. See Supplemental and Reply Brief for the Petitioner 14. Mathews v. Eldridge, supra at 346, n. 29.

From the Court's language, there can be no question that the relevant inquiry is the overall rate of error for the due process model looks in all cases to the reliability and fairness of a "system" of procedure. Using this analysis, the District Court clearly overstated the reversal rate by relying solely upon the rate of reversal at the hearing stage. The appropriate rate here is 13.5% although footnote 29 of the Eldridge opinion suggests that an even lower figure (2.2%) would be appropriate in this context.

Finally, Eldridge specifically noted that in the disability inquiry, the value of an evidentiary hearing, or even a limited oral presentation, did not appear substantial. Mathews v. Eldridge, supra at 344. The procedures used in terminating Title II disability benefits are essentially the same as those used in processing initial claims. 16/ In Eldridge these procedures were found appropriately "tailored" to the need of

16/ See generally, Rivers, p. 7-8; Schultz, p. 1-5.

the disability claimant in meeting the denial of his allegation of eligibility. Cf. Mathews v. Eldridge, supra at 349. It could therefore not be made plainer than by Eldridge that the interest of the class here was adequately protected and that no denial of due process resulted from the delays experienced.

Even without reaching the third consideration of the Eldridge due process model, the public and Government interest, it is apparent that no due process denial occurred, and that the decision below was incorrect. Adding consideration of the Government's interest only serves to accentuate the impropriety of the decision. A detailed analysis of the Government's interest is included in the next part of this brief.

C. The District Court Should Have Deferred To
Administrative and Congressional Efforts to
Remedy the Hearing Delay Situation.

1. The Agency's Efforts.

The Government's interest in the instant case is two-fold. Preliminarily, the Government's interest is in administering a national social welfare program of finite resources and limited administrative means in as equitable and efficient a manner as possible. The District Court ultimately failed to recognize the Government's interest in maintaining its prerogatives in administering the social security program. A more solicitous approach should have been taken. As noted in Richardson v. Perales, 402 U.S. 389, 399 (1971):

The [Social Security] system's administrative structure and procedures, with essential determinations numbering into the millions, are of a size and extend difficult to comprehend. But * * * '[s]uch a system must be fair and it must work.' (Emphasis supplied.)

Presently, the government's interest is in pursuing a remedial course to correct the hearing situation through both administrative and legislative initiatives found to be "the most effective action that can be taken immediately." H.R. 94-679, 94th Cong., 1st Sess. 1 (1975). Substantial harm may result if the instant order is allowed to stand. The relief involved will necessarily disrupt the Social Security Administration's efforts to remedy the current national backlog and will create an inequitable preference for class members.

In the course of the extensive hearings, the House Subcommittee on Social Security was advised of the size of the backlog, the reasons for the backlog, the extent of the delays, the nature of the inquiry, the possible remedies and their attendant difficulties. Congress made an informed legislative conclusion as to the best remedial course to be taken. It did not involve an immediate remedy, and it did not involve a fixed and inflexible mandate, such as setting a time limit. It is therefore clear that Congress felt such a "remedy" to be inappropriate, if not counterproductive.

2. Justiciability Issues - Restraint and Insusceptibility to Judicial Relief.

The agency and Congressional actions set out at pages 4 - 11 were the efforts of those most informed on the hearing delay problem to remedy a situation with which no one was happy by fashioning a fair and workable solution. This is in the interest

of the government, and of the public as well, since the steps were taken to remedy a national rather than a local problem. Assuming there were any merit to the constitutional contentions of the class involved, the interest of the government should certainly have been recognized as outweighing that interest. The local nature of the order below will considerably disrupt the organized and combined efforts of the executive and legislative branches of government. Notably defendant will, in order to meet the requirements of the court's order, be required to give preferential treatment to claimants in Connecticut to the detriment of those outside Connecticut by assigning Connecticut cases to Administrative Law Judges in other areas of Social Security Region I. Apart from actual hearing and decision time preparation, there will be time lost in travel and administrative matters connected with this detailing of administrative law judges. Longer delays for some non-class claimants will certainly result, and there is a very real possibility of additional suits seeking relief from those delays.

Even apart from the possible inequities resulting of the court order, there are additional concerns which should have forestalled judicial intervention. The pressure of an arbitrary time requirement may well adversely affect the outcome of decisions and is a direct interference with the decisional independence of the administrative law judges. An incorrect decision derogates the interest of the public and the government. Many applicants, their records not adequately developed due to time constraints, might not receive a proper decision on their claims, affecting not only their interests, but that of the government in making

the correct determination on the case. By the same token, error in favor of the claimant would result in waste of government resources, the Disability Trust Fund, in which instance "the cost of protecting those whom the administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited." Eldridge, supra at 348. Moreover, the judgment's award of payments when time limits are exceeded may produce an increase in hearing requests which will only exacerbate the problems in Connecticut and further drain the trust fund.

In light of the interest of the government and the public generally, the order below was certainly unwarranted, even apart from the fact the Appellees failed to meet the other components of the Eldridge due process model. There are, however, other reasons indicating that the judgment was inappropriate.

The Supreme Court has in recent years evinced its growing concern for agency prerogatives in areas of management and administration. As early as Wright v. Richardson, 405 U.S. 208 (1972), the Court set an example of deference and restraint. The Court in Wright was confronted by the same issue which was finally confronted in Eldridge, involving the regulations and procedures which preceded these challenged in Eldridge. The Court deferred action in Wright, stating

. . . . In the context of a comprehensive complex social welfare program, the administrative process must have a reasonable opportunity to evolve procedures to meet needs as they arise.

Both Congress and the agency have taken broad steps to meet the needs imposed by a monumental rise in hearing workload. The court below has not allowed those steps to take their designed course. As the Court in Eldridge noted

In assessing what process is due. . . substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administrations of the social welfare system that the procedures they have provided assure fair consideration of the entitlement claims of individuals. (Citation omitted.) 424 U.S. at 349.

Thus, the court should have refrained from entering an adverse judgment in the present case. The prospective judgment usurps the Social Security Administration's prerogative to retrench as circumstances change and to make a redetermination as to what is reasonable or necessary under prevailing national circumstances. 17/

Similarly, Congress' refusal to impose time limitations on hearings in disability claims is a matter which should have been given great weight below. Congress made an informed determination that P.L. 94-202 was the most effective action to be taken. Congress continues to study the problem. In Weinberger v. Salfi, supra at 784, the Supreme Court noted that particular substantive policy decisions on the utilization of limited resources in the administration of individual eligibility determinations were not precluded by the Constitution even when an individual is precluded from entitlement by a prophylactic

17/ See also, Like v. Carter, 448 F.2d 798, 804 (8 Cir. 1971) cert denied, 405 U.S. 1045 (1972): "The expertise of the federal agency charged with administration of the welfare program as to what constitutes a reasonable time is entitled to considerable weight."

presumption. The Court has also noted, in Arnett v. Kennedy, 416 U.S. 136 (1974) (plurality opinion of Justice Rehnquist), that where the focus of legislation is strongly on the procedural mechanism for enforcing a substantive right, that statutorily defined right is a guarantee as enforced by the procedure Congress has designated (supra at 152), and due process requires no more protections than contained in the statute bestowing the right (supra at 163). Congress is aware of the nature of the benefits it created in title II. Congress has made an election of remedies for the hearing delay problems, and the District Court should not have overridden it, settling specifically on a remedy Congress found unsuitable.

Congressional involvement should have precluded the decision below on justiciability grounds due to "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;. . . ." Baker v. Carr, 369 U.S. 212, 217 (1962).

Finally, the Secretary submits that the problem of hearing delays, due to the management problems involved, the limited resources involved, and the non-fungible nature of disability cases (see n. 16, supra) is one not susceptible to judicial remedy:

. . . many instances of delay, regardless of its effect on the parties, are not susceptible to judicial solution. Thus, for instance, crowded dockets resulting from inadequate appropriations and a lack of personnel demand solutions uniquely available to the Congress or the agencies themselves. Note, Judicial Acceleration of the Administrative Process: The Right to Relief From Unduly Protracted Proceedings, 72 Yale L.J. 574-575 (1963).

Accord, Goldman, Administrative Delay and Judicial Relief, 66 Mich. L.R. 1423, 1424-25 (1968). In any adjudicatory process, time is a natural and necessary expense. On occasion, work pressure will add to that expense. The remedy which must necessarily bear upon the fiscal and adjudicatory integrity of the process and upon policy choices made by the draftsmen of the statute and of the adjudicatory process must come from those individuals who are the creators and administrators of the process. Restraint is singularly appropriate where those persons have undertaken, as they have here, good-faith initiatives designed to correct any arguable deficiency.

The current processing problem has received and continues to receive the agency's attention and the attention of the Congress. As a result of that attention, the agency and the Congress have undertaken well-considered initiatives which will, we believe, resolve the problem. These initiatives represent the maximum reach of current agency and congressional resources. If further initiatives are desirable and/or possible, those initiatives must, we believe, come from the agency and the Congress. This view is entirely consistent with Eldridge which indicates that substantial, if not controlling, weight must be accorded the Secretary's good-faith judgment that these initiatives will provide fair consideration of the entitlement claims of individuals and with Wright which indicates that the administrative process must have a reasonable opportunity to evolve procedures to meet needs as they arise.

Defendant and the Congress, whose continuing concern with this situation is amply demonstrated in this record, "must be trusted to correct whatever defects experience may reveal." F.C.C. v. Pottsville B. Co., 309 U.S. 134, 146 (1940).

This deference or restraint is singularly appropriate here where the agency and the Congress are approaching a complex problem which arises in the context of an equally and necessarily complex administrative system designed to meet a truly massive workload. Solutions to the processing problem are neither neat nor immediate. Nor can they be made without policy choices, subtle and/or radical, which are necessarily committed to the discretion of those who created and administer the Act.

D. The District Court Should Not Have Granted
Prospective Payments.

As part of the relief ordered, the District Court additionally directed the Secretary to grant "prospective payments to those claimants who fail to receive their final decision within the maximum delays" permitted. 18/ (Judgment Order of October 29, 1976, paragraph 2.) Since relief of this nature has been rejected by the Congress in the enactment of Section 205(q) and in the context of the current backlog, the District Court clearly acted improperly. Moreover, a statutory impediment to the payments plainly exists.

18/ By supplemental judgment filed December 1, 1976, the District Court on motion of the parties, clarified paragraph 2 of the October 29, 1976 judgment limiting its operation to July 1977 and months thereafter as provided in the ruling of September 29, 1976.

As we indicated at pages 16-19, Senator Scott's original proposal for expedited benefit payments encompassed disability benefits. The resulting legislation, Section 205(q), clearly rejected this approach by a specific exception of applications for disability insurance from the expedited benefit process. Section 205(q)(5) of the Social Security Act, 42 U.S.C. §405(q). The rationale is clearly set out in the committee report found at pages 17-18. In addition, the Congress clearly could have elected such a remedy in the current context, but it did not. As a result, the District Court formulated a remedy which clearly entails a loss of benefit monies because of payments to otherwise ineligible individuals. ^{19/} While paragraph 2 does give defendant a right to recover such payments, recovery may well be impossible due to the circumstances of some and will bear an additional administrative cost that will reduce the effective recovery of erroneously paid monies and/or preclude recovery of small sums. In addition, the prospect of payment may lead to increased requests for hearings by ineligible individuals to the detriment of all concerned.

Since the Congress plainly declined to suffer this drain on the resources of the Trust fund, the District Court should not have assumed to do so. The best delineation of the public interest must, in this case, come from the Congress which tailored the statute to serve the public interest and reconcile competing private interests. Since the Congress has declined to place

^{19/} Since the reversal rate at the hearing level utilized by the court is roughly 50%, payments will be made to ineligible individuals in nearly one-half of the cases.

speed of payment over correctness of payment (see 42 U.S.C. §405(q), 405(i)), a deference to that judgment is appropriate.

The statutory difficulty in this instance arises from Section 205(i) of the Social Security Act, 42 U.S.C. §405(i), which defines the defendant's authority for certification of payments from the social security trust funds. Section 205(i) provides in pertinent part that:

Upon final decision of the Secretary, or upon final judgment of any court of competent jurisdiction, that any person is entitled to any payment or payments under this title, the Secretary shall certify to the Managing Trustee the name and address of the person so entitled to receive such payments or payments, the amount of such payment or payments, and the time at which such payment or payments should be made. . .

As the plain language of the statute indicates, the defendant's power to certify payments from the trust funds is statutorily limited to situations in which a "final decision" or "final judgment" "that [a] person is entitled to [a] payment" has been entered. Since payments are, under the judgment, to be made prior to entry of the Secretary's "final decision" and are not predicated upon entitlement under the terms of the Act, the court's ruling would compel action by the defendant which is clearly beyond his authority under the terms of the Act. Accordingly, the grant of relief should be reversed.

II. Procedural Issues

A. The Complaint Should Have Been Dismissed As Moot.

At the time this action was certified as a class action, the claim of the named plaintiff was moot. The class was certi-

fied on July 18, 1975. Before that occurred the named plaintiff had had a hearing. Rivers, p. 4. No relief remained which the court could grant the named plaintiff. "[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class." O'Shea v. Littleton, 414 U.S. 488, 494 (1974). (Citations omitted.) Certification of the class did not save the case from mootness, because "A litigant [must be] a member of the class which he or she seeks to represent at the time the class action is certified." Sosna v. Iowa, 419 U.S. 393, 403 (1975). (Emphasis supplied.) The present case did not meet that requirement and should have been dismissed.

The District Court reached a contrary result by relying upon a hypothetical exception postulated in Sosna which would permit a certification to relate back to the filing of the complaint where "the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion." Sosna v. Iowa, supra at 402 n. 11. While the point is not without doubt, the District Court appears to have adopted a broad construction of the exception inconsistent with the strict construction that follows from the constitutional nature of the Article III "case or controversy" requirement. The exception is not a

matter of judicial convenience or based upon a pragmatic recognition that the dismissal will only result in a new action brought by another aggrieved by a continuing factual situation. Rather, the exception, like the Sosna doctrine, must rest upon an "exigency. . . [which] serves to identify its limits." Sosna v. Iowa, supra at 401-02. Since the certification would have preserved the controversy and could, in this case, have been concluded with respect to the named plaintiff or another so aggrieved before a hearing decision was rendered, given the delays complained of, the issue would not have become "inexorably" moot before certification in the majority of cases. Consequently, the Sosna exception was not appropriate in this case.

B. The District Court Lacked Subject Matter Jurisdiction.

The court in the present case took jurisdiction under the mandamus statute, 28 U.S.C. §1361. Weinberger v. Salfi, 422 U.S. 749 (1975), establishes that mandamus jurisdiction is precluded in the present case:

The literal wording of this section bars actions under §41 of Title 28. At the time §405(h) was enacted, and prior to the 1948 recodification of Title 28, §41 contained all of that title's grant of jurisdiction to United States district courts, save for several special-purpose jurisdictional grants of no relevance to the constitutionality of Social Security statutes. Salfi, supra at 756-57, n. 3.

* * * * *

Thus, the plain words of the third sentence of §405(h) do not preclude constitutional challenges. They simply require that they be brought under jurisdictional grants contained in the Act, . . . Salfi, supra at 762.

* * * * *

The class thus cannot satisfy the requirements for jurisdiction under 42 U.S.C. §405(g). Other sources

of jurisdiction being foreclosed by §405(h) the District Court was without jurisdiction over so much of the complaint as concerns the class, and it should have entered an appropriate order of dismissal. Salfi, supra at 764 (emphasis supplied).

That the preclusion of other jurisdictional bases by Section 205(h) extends to §1361 is evident. As noted in Morris v. Weinberger, 401 F. Supp. 1071, 1084 (D. Md., 1975), Salfi would appear to be an exercise in futility if plaintiff-claimant could circumvent the exhaustion requirement of Section 205(g) simply by bringing suit under §1361. Although the Morris court found no direct guidance in Salfi since Section 205(h) refers to "§41 of Title 28", and Section 1361, not yet enacted, was not then a part of that Title, the court should not have been troubled. Salfi notes specifically that when Section 205(h) was enacted it contained all of that title's general jurisdictional grants. Weinberger v. Salfi, supra at 756-57, n. 3. Moreover, the class in Salfi had alleged Section 1361 among its jurisdictional bases. Thus, Section 1361 jurisdiction is precluded by Salfi. Furthermore, under traditional rules of statutory construction a reference to the general law on a given subject is construed to mean that the law is as it reads thereafter at any given time including amendments subsequent to the time of adoption. 2A Sutherland, Statutory Construction §51.07 (4th Ed., 1973).

Finally, if Salfi would be an exercise in futility were Section 1361 jurisdiction not precluded by Section 205(h), Mathews v. Eldridge, supra, would be even more so. The Court in Eldridge went to considerable effort in construction to find jurisdiction under Section 205(g) making it clear that the Court regards Section 205(h) as interpreted in Salfi as barring all other jurisdiction

bases. 20/ The Ninth Circuit has recently recognized that Section 1361 jurisdiction is precluded by the Salfi reading of Section 205(h). Roane v. Mathews, 538 F.2d 852 (9 Cir. 1976).

Even absent the preclusion of Section 205(h), mandamus provide no basis for jurisdiction or the relief granted in this case. The legislative history of the mandamus statute reveals that the statute's construction turns upon traditional mandamus law. Davis, Administrative Law Treatise (1970 Supplement), sect 23.10. See Rural Electrification Administration v. Northern States Power Company, 373 F.2d 686 (6 Cir. 1967) cert. denied 387 U.S. 945 (1968). In order for mandamus to lie to compel performance of duty, that duty must be plainly defined under the terms of applicable law. The very construction of a statute may be a distinct and profound exercise of administrative discretion which cannot be influenced by mandamus. Rural Electrification Administration v. Northern States Power Company, supra n. 14 at 694. We believe for reasons detailed supra at p. 15-19 that the statutory requirement of "reasonable notice and opportunity for a hearing" Sections 205(b) of the Act, 42 U.S.C. §405(b), constitutes such a statute and that the court, therefore, incorrectly found a duty to provide a hearing with a fixed time limitation. Moreover, it is significant in this regard that the District Court recognized that the Secretary's

20/ Section 205(g) is not alleged here.

duties are to some measure discretionary. Ruling of September 29, 1976, p. 12. The assumption of Section 1361 jurisdiction seems inconsistent with this recognition. This is especially so since the District Court noted that for mandamus to lie when discretion is involved, the action or inactions complained of must "greatly exceed the discretion rested in this office." Ruling, p. 12.

The District Court incorrectly concluded that this standard was met. Since the record establishes that both the Congress and Secretary have acted both vigorously and innovatively to bring the available resources to bear in resolution of a national problem, it cannot be said that the Secretary has by action or inaction greatly exceeded his discretion. The District Court's contrary conclusion is, in substance, nothing more than a conclusion that the discretion might have been differently exercised or a failure to recognize that a remedy, satisfactory to the District Court, was beyond the scope of the Secretary's discretion. Accordingly, mandamus jurisdiction was precluded even under a traditional analysis. 21/

21/ While the District Court alludes in its ruling to the possible existence of Section 205(g) jurisdiction, the plaintiffs have not asserted this potential jurisdictional base. A discussion of the impropriety of Section 205(g) jurisdiction may be found in Defendant's Reply to Plaintiff's Memorandum in Reply and Supplemental Memorandum at pages 12-14. If jurisdiction could be predicated upon Section 205(g), this would raise additional questions regarding the judgment in this case for section 205(g) would preclude class and injunctive relief. See, Weinberger v. Salfi, supra at 763, n.8.

C. Class Certification Was Inappropriate.

1. Appellee was not a class member.

As noted in Part A a litigant must be a member of the class he seeks to represent at the time the class action is certified. Sosna v. Iowa, supra. Plaintiff's claim was moot before class certification and he accordingly could not represent a class. O'Shea v. Littleton, supra 414 U.S. at 494. Class certification was therefore erroneous. Additionally, there are other reasons why class certification was erroneous.

2. The Class Fails to Meet the Requirement of F.R.C.P. 23(a)(2).

There are many variables involved in the hearing process that may affect the timing of a particular case. 22/ These variable facts render the class unable to meet the requirement of F.R.C.P. 23(a)(2) that common questions of law and fact exist among class members. Issues that arise which are not susceptible to generally applicable proof render an action inappropriate for class action treatment despite the allegation of one common issue. National Auto Brokers Corp. v. General Motors Corp., 60 FRD 476 (S.D. N.Y., 1973). A class action is further inappropriate

22/ For example: (1) the distance claimant is located from a hearing office (if a claimant is located an unreasonable distance for him to be expected to commute or he is unwilling to do so, his claim may be held until enough claims in his area accumulate to justify the cost of a hearing officer's going there); (2) whether consultative medical examinations and other prehearing development is required; (3) whether arrangements must be made for appearance of expert witnesses; (4) whether consultative medical examinations and other posthearings development is required.

where the rights of others depend upon the circumstances of each individual case. California v. Rank, 293 F.2d 340, 348 (9 Cir. 1961). Whether any individual has been subjected to "unreasonable" delay depends upon the application of the statutory standards in question to the unique circumstances of that individual's situation. Class certification was therefore inappropriate.

Conclusion

The record in this case demonstrates that the timing of hearings rests within the Secretary's discretion and the delays complained of, hardly unreasonable under the circumstances, result from a backlog whose remedy is equally within that discretion and the discretion of the Congress. For these and the reasons stated above, it is respectfully submitted that the District Court decision should be vacated, remanded and dismissed for mootness, or for lack of jurisdiction. Alternatively, the decision of the District Court should be reversed.

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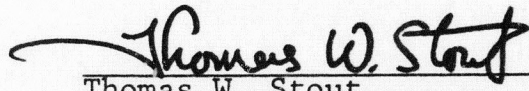
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FEBRUARY, 1977

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of March, 1977,
I served the foregoing Brief for the Appellant, by mailing copies,
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S T A T U T O R Y

A D D E N D U M

Relevant sections of the Social Security Act, Title II
(42 U.S.C. §401, et seq.) provide in pertinent part:

§ 405. Evidence, procedure, and certification for payments
—Rules and regulations; procedures

(a) The Secretary shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this subchapter, which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder.

Administrative determination of entitlement to benefits; findings of fact; hearings; investigations

(b) The Secretary is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Upon request by any such individual or upon request by a wife, divorced wife, widow, surviving divorced wife, surviving divorced mother, husband, widower, child, or parent who makes a showing in writing that his or her rights may be prejudiced by any decision the Secretary has rendered, he shall give such applicant and such other individual reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse his findings of fact and such decision. Any such request with respect to such a decision must be filed within such period after such decision as may be prescribed in regulations of the Secretary, except that the period so prescribed may not be less than six months after notice of such decision is mailed to the individual making such request. The Secretary is further authorized, on his own motion, to hold such hearings and to conduct such investigations and other proceedings as he may deem necessary or proper for the administration of this subchapter. In the course of any hearing, investigation, or other proceeding, he may administer oaths and affirmations, examine witnesses, and receive evidence. Evidence may be received at any hearing before the Secretary even though inadmissible under rules of evidence applicable to court procedure.

Judicial review

(g) Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court shall, on motion of the Secretary made before he files his answer, remand the case to the Secretary for further action by the Secretary, and may, at any time, on good cause shown, order additional evidence to be taken before the Secretary, and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or its decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

Finality of Secretary's decision

(h) The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover damages arising under this subchapter.

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(i) **Certification for payment.** Upon final decision of the Secretary, or upon final judgment of any court of competent jurisdiction, that any person is entitled to any payment or payments under this title, the Secretary shall certify to the Managing Trustee the name and address of the person so entitled to receive such payment or payments, the amount of such payment or payments, and the time at which such payment or payments should be made, and the Managing Trustee, through the Division of Disbursement of the Treasury Department, and prior to any action thereon by the General Accounting Office, shall make payment in accordance with the certification of the Secretary (except that in the case of (A) an individual who will have completed ten years of service creditable under the Railroad Retirement Act of 1937 [45 USCS §§ 228a-228s-3] or the Railroad Retirement Act of 1974 [45 USCS §§ 231-231t], (B) the wife or husband of such an individual, (C) any survivor of such an individual if such survivor is entitled, or could upon application become entitled, to an annuity under section 2 of the Railroad Retirement Act of 1974 [45 USCS § 231a], and (D) any other person entitled to benefits under section 202 of this Act [42 USCS § 402] on the basis of the wages and self-employment income of such an individual (except a survivor of such an individual where such individual did not have a current connection with the railroad industry, as defined in the Railroad Retirement Act of 1974 [45 USCS §§ 231-231t], at the time of his death), such certification shall be made to the Railroad Retirement Board which shall provide for such payment or payments to such person on behalf of the Managing Trustee in accordance with the provisions of the Railroad Retirement Act of 1974 [45 USCS §§ 231-231t]):

Provided, That where a review of the Secretary's decision is or may be sought under subsection (g) the Secretary may withhold certification of payment pending such review. The Managing Trustee shall not be held personally liable for any payment or payments made in accordance with a certification by the Secretary.

Expedited benefit payments

(q)(1) The Secretary shall establish and put into effect procedures under which expedited payment of monthly insurance benefits under this subchapter will, subject to paragraph (4) of this subsection, be made as set forth in paragraphs (2) and (3) of this subsection.

(2) In any case in which—

(A) an individual makes an allegation that a monthly benefit under this subchapter was due him in a particular month but was not paid to him, and

(B) such individual submits a written request for the payment of such benefit—

(i) in the case of an individual who received a regular monthly benefit in the month preceding the month with respect to which such allegation is made, not less than 30 days after the 15th day of the month with respect to which such allegation is made (and in the event that such request is submitted prior to the expiration of such 30-day period, it shall be deemed to have been submitted upon the expiration of such period), and

(ii) in any other case, not less than 90 days after the later of (I) the date on which such benefit is alleged to have been due, or (II) the date on which such individual furnished the last information requested by the Secretary (and such written request will be deemed to be filed on the day on which it was filed, or the ninetieth day after the first day on which the Secretary has evidence that such allegation is true, whichever is later),

the Secretary shall, if he finds that benefits are due, certify such benefits for payment, and payment shall be made within 15 days immediately following the date on which the written request is deemed to have been filed.

(3) In any case in which the Secretary determines that there is evidence, although additional evidence might be required for a final decision, that an allegation described in paragraph (2)(A) is true, he may make a preliminary certification of such benefit for payment even though the 30-day or 90-day periods described in paragraph (2)(B)(i) and (B)(ii) have not elapsed.

(4) Any payment made pursuant to a certification under paragraph (3) of this subsection shall not be considered an incorrect payment for purposes of determining the liability of the certifying or disbursing officer.

(5) For purposes of this subsection, benefits payable under section 423 of this title shall be treated as monthly insurance benefits payable under this subchapter.  This subsection shall not apply with respect to any beneficiary whose check has been negotiated, or with respect to any beneficiary who is due under either section 423 of this title, or under this title to a wife, husband, or child of an individual who is applying for benefits under section 423 of this title, or who has attained age 62 and is under a disability, or who is on the basis of being under a disability.

Filing application

(b) An application for disability insurance benefits filed before the first month in which the applicant satisfies the requirements for such benefits (as prescribed in subsection (a)(1) of this section) shall be deemed a valid application only if the applicant satisfies the requirements for such benefits before the Secretary makes a final decision on the application. If, upon final decision by the Secretary, or decision upon judicial review thereof, such applicant is found to satisfy such requirements, the application shall be deemed to have been filed in such first month. An individual who would have been entitled to a disability insurance benefit for any month had he filed application therefor before the end of such month shall be entitled to such benefit for such month if such application is filed before the end of the 12th month immediately succeeding such month.

Same; disability

(d)(1) The term "disability" means—

(A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months; or

(B) in the case of an individual who has attained the age of 55 and is blind (within the meaning of "blindness" as defined in section 416(i)(1) of this title), inability by reason of such blindness to engage in substantial gainful activity requiring skills or abilities comparable to those of any gainful activity in which he has previously engaged with some regularity and over a substantial period of time.

(2) For purposes of paragraph (1)(A)—

(A) an individual (except a widow, surviving divorced wife, or widower for purposes of section 402(e) or (f) of this title) shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

(B) A widow, surviving divorced wife, or widower shall not be determined to be under a disability (for purposes of section 402(e) or (f) of this title) unless his or her physical or mental impairment or impairments are of a level of severity which meets the regulations prescribed by the Secretary which are sufficient to preclude an individual from engaging in substantial gainful activity.

(3) For purposes of this subsection, a "physical or mental impairment" is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by acceptable clinical and laboratory diagnostic techniques.

(d)

(4) The Secretary shall by regulations prescribe the criteria for determining when services performed or earnings derived from services demonstrate an individual's ability to engage in substantial gainful activity. Notwithstanding the provisions of paragraph (2), an individual whose services or earnings meet such criteria shall, except for purposes of section 422(c) of this title, be found not to be disabled.

(5) An individual shall not be considered to be under a disability unless he furnishes such medical and other evidence of the existence thereof as the Secretary may require.